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No. 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Did the court below err in holding that a Jewish plaintiff in an action under 42 U.S.C. § 1982 must prove that he or she is a member of a "non-white race," with the result that Jews can never state a claim under 42 U.S.C. § 1982 even where, as here, they are victims of conduct motivated by a Ku Klux Klan and Nazi-inspired racial animus against Jews?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court of appeals were appellants (now petitioners) Shaare Tefila Congregation, Rabbi Martin S. Halpern, Shirley Altman, William Harkaway, Marshall S. Levin, Maurice Potosky and Dr. Jacob Teller. Petitioners will be referred to collectively herein as "the Congregation." Appellees below (now respondents) were John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hess, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Queen and Michael David Remer. The Rule 28.1 statement regarding Shaare Tefila Congregation was made in its Application for Extension of Time to File Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit, filed May 14, 1986, at note 1.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-23a) is reported at 785 F.2d 523.[1] The opinion of the United States District Court for Maryland (Pet. App. 24a-35a) is reported at 606 F. Supp. 1504.

JURISDICTION

The Fourth Circuit rendered and entered its judgment (Pet. App. 36a) on March 7, 1986. Chief Justice

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[1] "Pet. App." refers to the Appendix to the Petition for Certiorari.

Warren E. Burger extended the time to file a petition for certiorari to and including July 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 1982 (1982)

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Civil Rights Act of 1866
Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, * * * are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, * * * shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

STATEMENT OF THE CASE

On November 1, 1982, respondents desecrated the synagogue of Shaare Tefila Congregation with spray-painted anti-Semitic slogans and symbols, including swastikas, a burning cross, the words "DEAD JEW," "DEATH TO THE JUDE," and "IN, TAKE A SHOWER JEW" (Pet. App. 43a, 49a-56a).[2] Shaare Tefila Congregation is a Jewish community of approximately 500 member families which assembles at its synagogue for worship and other community activities (Pet. App. 41a). Before desecrating the synagogue, respondents spray-painted the outside walls of a nearby Drug Fair with a burning cross, the slogans "White Power" and "Arian [*sic*] Brotherhood," the initials KKK, an eagle with a swastika, a Star of David with an arrow through it, and their initials (Pet. App. 43a). While they vandalized the Drug Fair, one of the respondents suggested: "Somebody should do that to a synagogue." In response to that suggestion, respondents then walked as a group across the parking lot and defaced the walls of Shaare Tefila synagogue (Pet. App. 12a, 43a). They also painted a swastika on a car owned by a member of the Congregation (Pet. App. 49a).

Petitioners filed a civil rights action against respondents in the United States District Court for Maryland, seeking redress under 42 U.S.C. §§ 1981, 1982, and 1985(3) (Pet. App. 39a-48a).[3] The complaint

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[2] Photographs showing the defacement of the synagogue walls are reproduced at Pet. App. 51a-56a.

[3] The Congregation also brought pendent state claims for trespass, nuisance, and intentional infliction of emotional distress (Pet. App. 46a).

alleged that respondents' conduct "was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews," in violation of 42 U.S.C. § 1982 (Pet. App. 45a).

Although the parties have not completed discovery,[4] the record below confirms that respondents' desecration of the synagogue was an expression of racial animus toward Jews. Respondents admit that they chose the words and symbols they painted on the synagogue because of their association with Nazi and Ku Klux Klan ideology, which espouses the false and abhorrent doctrine that Jews are a distinct and inferior race. Respondents' paintings of swastikas, an eagle over a swastika,[5] and the words "DEATH TO THE JUDE," "IN, TAKE A SHOWER JEW," "TO-TEN KAMF RABAND," and "DEAD JEW" on the synagogue walls invoked the tragic legacy of Nazi Germany and the systematic killing of over six million Jews in the Holocaust. The swastika was the symbol of the Nazi Party from its inception, and the phrases

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[4] Petitioners have taken the deposition testimony of respondents Hunt, Heine, Queen, and Cobb. While the motion to dismiss was pending, petitioners sought leave to depose respondent Remer in prison pursuant to Fed. R. Civ. P. 30(a). That motion was pending when the district court dismissed the complaint (J.A. 3).

[5] Respondents have identified the swastika as a Nazi symbol and all four respondents who have been deposed have identified the eagle painted on the Drug Fair as a Nazi eagle. *See* Deposition of Dominic Queen (April 18, 1984) at 21; Deposition of John W. Cobb (Sept. 6, 1984) at 27, 54; Deposition of Thomas Lloyd Heine (Oct. 19, 1984) at 50-51; Deposition of Thomas Joseph Hunt, Jr. (Nov. 1, 1984) at 61. Respondent Hunt testified that respondent Remer has an eagle like the eagle painted at the Drug Fair tattooed on his leg. Hunt deposition at 60.

"DEAD JEW," "DEATH TO THE JUDE" [6] and "IN, TAKE A SHOWER JEW" refer to the Third Reich's "final solution to the Jewish problem"—the Holocaust (Pet. App. 61a-63a).[7] The phrase "TOTEN KAMF RA-BAND" next to the skull and crossbones painted on the synagogue is a garbled reference to the Totenkopfverbände, the "death head units" of Nazi concentration camp guards from 1936 through World War II (Pet. App. 63a). The skull and crossbones was the insignia of the Totenkopfverbände (Pet. App. 63a). The burning crosses which respondents emblazoned on the synagogue walls are the symbol of the Ku Klux Klan (Pet. App. 58a).[8]

Respondent Remer conceded in his opposition to the petition for certiorari "the respondents' admittedly

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[6] Jude is German for Jew.

[7] Respondents conceded their understanding that the slogans "DEAD JEW" and "IN, TAKE A SHOWER JEW" referred specifically to the Nazi extermination of Jews during World War II. *See* Hunt deposition at 93-94; Cobb deposition at 58-59; Heine deposition at 76. Various respondents also testified on deposition that there was discussion about the Nazis during the defacement of the Drug Fair and the synagogue. For example, respondent Heine testified that respondent Remer talked about the Nazis during the course of the desecration on November 1. Heine deposition at 40. *See also id.* at 78. Respondent Cobb agreed that the Nazis were discussed during the desecration. Cobb deposition at 55. *See also id.* at 27.

[8] One of the Klan's traditional methods of harassing blacks, Jews, or other groups it believes are inferior has been to burn a cross on their property (Pet. App. 58a). Respondents admitted their understanding that the burning cross is associated with the Ku Klux Klan. *See* Hunt deposition at 73; Cobb deposition at 34; Heine deposition at 47. In fact, respondent Hunt has a burning cross tattooed on his arm. Hunt deposition at 71.

irrational misapprehensions of Jews as members of a distinct and inferior race."[9] Moreover, the undisputed affidavits of Robert Wolfe and David M. Chalmers, which the Congregation submitted in opposition to the motion to dismiss (Pet. App. 57a-75a), show that Nazi and KKK bias against Jews is based on racial prejudice. Mr. Wolfe, the Chief of the Modern Military Headquarters Branch of the National Archives, is the custodian of captured documents of the Third Reich (Pet. App. 61a). Mr. Wolfe attested that "[i]t was one of the central tenets of Nazi ideology that Jews were defined as racially distinct from Aryan, or white, German citizens" (Pet. App. 63a).[10] The Nuremberg Laws of September 15, 1935 and November 14, 1935 raised this notion to a legal command: Jews were declared a separate race and denied the rights of German cit-

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[9] Brief of Michael David Remer in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, at 2 (Sept. 8, 1986) (footnote omitted).

[10] Hitler's misconceived belief that Jews are racially distinct formed the basis for his virulent anti-Semitism and program to exterminate the Jews:

> The Jew has always been a people with definite racial characteristics and never a religion* * * .
>
> * * *
>
> The Jewish state was never spatially limited in itself, but universally unlimited as to space, though restricted in the sense of embracing but one race* * * . It is one of the most ingenious tricks that was ever devised, to make this state sail under the flag of "religion," thus assuring it of the tolerance which the Aryan is always ready to accord a religious creed. For actually the Mosaic religion is nothing other than a doctrine for the preservation of the Jewish race. [A. Hitler, *Mein Kampf* 306, 150 (R. Manheim trans. 1943).]

izens (Pet. App. 63a, 66a-75a).[11] Dr. Chalmers, one of the foremost authorities on the Ku Klux Klan and author of *Hooded Americanism: The History of the Ku Klux Klan* (2d ed. 1981), attested that "a prevalent belief among the various Ku Klux Klan groups is that Jewish people are racially distinct from whites" (Pet. App. 58a).[12]

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[11] That Nazism and other forms of anti-Semitism are motivated by racial prejudice has been judicially recognized. *See Banker* v. *Time Chemical, Inc.*, 579 F. Supp. 1183, 1186 (N.D. Ill. 1983) ("[t]he vicious anti-Semitism directed against the Jews of Nazi Germany, for example, was racially motivated"); *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 567 (E.D. Cal. 1982) ("[t]he history of 'racial prejudice' against Jews throughout Europe and in this country appears to be so well known as almost not to require documentation").

[12] This conclusion is supported by other studies:

> The fundamental theme of Klan ideology is the racist doctrine of "white supremacy," a concept that has motivated the hooded orders since their inception. It serves as justification for bigotry and violence against blacks, Jews, Hispanics, Orientals and other minorities. [Anti-Defamation League of B'nai B'rith, *Hate Groups in America: A Record of Bigotry and Violence* 17 (1982).]

In The Thunderbolt, the official publication of the National States Rights Party, which is ideologically linked to the Klan, J.B. Stoner, the party's national chairman, distinguished Jews from Whites:

> The negro [*sic*] is a violent enemy and he is a biological enemy because negro [*sic*] blood destroys White blood when the two are mixed together. However, the negro [*sic*] is not the enemy. The Jew is THE enemy of our White Race and the Jew is using the negro [*sic*] in an effort to destroy the White Race that he so passionately hates. [J. Stoner, *The Philosophy of White Racism*, The Thunderbolt (Oct. 1973).]

Each of the respondents has testified that the Nazi and Klan ideologies, whose slogans and symbols they painted on the synagogue, extol racism against Jews to promote a "superior" race—a white race that excludes Jews. For example, respondent Heine referred to Jews as a racial group in his description of KKK activity:

> Q. What is obviously known about [the Ku Klux Klan]?
>
> A. They're prejudiced. They're just against black people and Jewish people and I guess some other races or something.[13]

When asked whether respondent Remer spoke about the Jewish people while he vandalized the Drug Fair, respondent Cobb testified that he spoke about the "white race."[14]

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[13] Heine deposition at 47. Respondent Heine also testified that the Nazis sought to develop a "superior race" that would exclude blacks and Jews. Heine deposition at 52-53. Respondent Queen understood that the slogan "Aryan Brotherhood" (painted by respondents on the Drug Fair as "Arian [*sic*] Brotherhood") reflected a Nazi ideology that excludes Jews from the "Aryan people." Queen deposition at 21-22.

[14] Cobb deposition at 29, 32. Respondent Cobb also defined anti-Semitism in terms of racism:

> Q. Mr. Cobb, are you familiar with the term anti-Semitic?
>
> A. Something like racism or something.
>
> * * *
>
> Q. Racism against whom?
>
> A. Against different races, I guess, different people.
>
> * * *

When asked why he thought a Jew seeing the phrase "Dead Jew" painted on a synagogue would feel uncomfortable, respondent Hunt replied: "It's an insult to your race."[15]

Before the parties completed discovery, respondent Remer filed a motion based on Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint in its entirety. Without hearing oral argument or considering the extensive deposition testimony, affidavits, or other material submitted in opposition to the motion, the district court granted Remer's motion to dismiss all counts of the complaint.[16] Apparently believing that the question of whether the defendants acted out of racial prejudice turns on whether the plaintiffs are members of a

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Q. You said it's a term that signifies racism of some sort. I'm asking you racism against whom?

A. I guess against Jewish people or the blacks or whoever. [Cobb deposition at 31.]

[15] Hunt deposition at 94.

[16] Deposition excerpts and the affidavits cited herein were among the materials submitted by petitioners with their opposition to respondents' motion to dismiss in the district court. The district court refused to consider the extra-pleading materials, purportedly because they "are inappropriate in a motion based, as this one is in part, on Rule 12(b)(1)* * *" (Pet. App. 24a n.1). This conclusion is, however, contrary to *Saval* v. *BL Ltd.*, 710 F.2d 1027, 1029 n.2 (4th Cir. 1983) ("[a]s to motions to dismiss under Rule 12(b)(1), courts may consider affidavits and other extrinsic information to determine whether subject matter jurisdiction exists"). In any event, when the district court chose to exclude the material outside the pleadings, it was bound to deny the motion unless it appeared beyond doubt that petitioners could prove no set of facts which would entitle them to relief. *See Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

"non-white" race, the district court concluded that Jews could never state a claim under §§ 1981 and 1982 (Pet. App. 30a). The district court believed that permitting such a claim would allow coverage of those sections to be based "entirely on the idiosyncrasies of individual defendants" (Pet. App. 30a).

A panel of the United States Court of Appeals for the Fourth Circuit affirmed, but filed three separate opinions (Pet. App. 1a-23a). Judge Hall, writing for the court, concluded that the court could "find nothing in the statute, its legislative history, or subsequent case law which would lead [it] to conclude that section 1982 was intended to apply to situations in which a plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants" (Pet. App. 6a) (emphasis in original). Judge Hall wrote that the court did not "find the position of Jews in this society to be analogous to that of Mexican-Americans or others commonly considered to be non-whites," and so to allow the Congregation to state a claim under § 1982 "would permit charges of racial discrimination to arise out of nothing more than the subjective, irrational perceptions of defendants. Such perceptions are not what section 1982 was intended to protect against" (Pet. App. 7a). Judge Murnaghan, who concurred with Judge Hall, agreed that respondents' "misperceptions of fact" should not confer federal jurisdiction, and concluded that "such ill mannered and unreasoned fracases" should not be accorded "the dignity of status as civil rights controversies" (Pet. App. 10a). Judge Murnaghan concluded that such disputes belong in state courts.

Judge Wilkinson dissented. He reasoned that respondents' conduct here was no more mistaken than

any other act of racism, because all such acts are fundamentally wrongheaded and in error:

> All racial prejudice is the result of subjective, irrational perceptions, which drain individuals of their dignity because of their perceived equivalence as members of a racial group. The Civil Rights Acts of 1866 and 1871 were enacted precisely to halt the spread of violence and hatred by those motivated by such perceptions, and plaintiffs in this case, no less than those in the usual racial discrimination case, have suffered the consequences of abhorrent notions concerning racial identity and its relevance. Rather than allowing ignorance and misperception to provide their own defense, I would find the erroneous but all too sincere view of defendants that Jews constitute a separate race worthy of humiliation and degradation sufficient to bring the claim within 42 U.S.C. §§ 1982 and 1985(3). [Pet. App. 11a (footnote omitted).][17]

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[17] Judge Wilkinson concluded that petitioners' claim under § 1985(3), the civil rights conspiracy statute that originated in the Ku Klux Klan Act of 1871, should be reinstated to the extent it alleges a violation of § 1982 (Pet. App. 11a n.1). This conclusion is correct because federal statutory violations constitute deprivations of "equal protection of the laws or equal privileges and immunities under the laws" which give rise to liability under § 1985(3). *See Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 376 (1979). *Accord, e.g., McNutt* v. *Duke Precision Dental & Orthodontic Laboratories, Inc.*, 698 F.2d 676, 679-80 (4th Cir. 1983) ("[s]ection 1985(3) merely provides a remedy for the violation of rights guaranteed by federal law or the Constitution"); *Holmes* v. *Finney*, 631 F.2d 150, 154 (10th Cir. 1980) ("infringement of some federally protected right independent of

Judge Wilkinson rejected the impression left by the majority opinion "that the incident at issue here was an isolated event with only speculative racial overtones" (Pet. App. 11a). He reviewed the record and the standards governing consideration of a motion to dismiss and concluded that "there is no question on appeal that defendants considered Jews to be a racially distinct group" (Pet. App. 13a). The racist conduct of respondents in desecrating the synagogue is enough to give rise to a § 1982 claim, Judge Wilkinson determined, because it is "preposterous to require that these [racist] beliefs be objectively true before federal law provides protection. To the contrary, it is precisely because such beliefs are false and reprehensible that federal civil rights laws were enacted. These laws provide redress for the harms suffered by misperceptions about the relevance of race as a basis for action in our society" (Pet. App. 15a).

Judge Wilkinson further rejected the majority's approach because it would "require[] courts to determine by some more objective criteria whether an individual is a member of a distinct race before the Civil Rights Act of 1866 may apply" (Pet. App. 18a). Judge Wilkinson believed it "regrettable that the majority has adopted an approach that demands judicial draftsmanship of an officially recognized and protected list of races. It is doubly regrettable that it

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§ 1985(3) is required for a violation of the conspiracy statute to be demonstrated"); *Cohen* v. *Illinois Inst. of Technology*, 524 F.2d 818, 828 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) ("[t]here is * * * a requirement that the conspiracy deprive the plaintiff of a federally protected right"); *Witten* v. *A.H. Smith & Co.*, 567 F. Supp. 1063, 1071-72 (D. Md. 1983) (federal statutory rights, specifically including rights under § 1981, may serve as a substantive basis for redress under § 1985(3)).

adopts this approach in a case where the racial nature of the acts is so compelling" (Pet. App. 21a-22a) (footnote omitted). Judge Wilkinson "would hold the congregation of Shaare Tefila Synagogue entitled to the protection of our civil rights laws [because] [t]o do otherwise is to blind ourselves as a nation to the real nature of race prejudice, and to leave American citizens open to the depredations of racial violence—the very acts against which Congress more than a century ago had sought to protect them" (Pet. App. 23a).

SUMMARY OF ARGUMENT

This Court's holdings construing § 1 of the Civil Rights Act of 1866 make clear that the Act protects against "*all racially motivated deprivations* of the rights enumerated in the statute * * *." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis added). Yet the United States Court of Appeals for the Fourth Circuit held that Jews can never state a claim under 42 U.S.C. § 1982, a successor to the 1866 Act, because they are not a "racially distinct group."

Jews, of course, are not racially distinct from whites. But this Court consistently has concluded that racism is the evil that the 1866 Act was intended to combat, regardless of the identity of the group against which that racism is directed. In fact, whites may state a claim under 42 U.S.C. §§ 1981 and 1982, the successors to the 1866 Act. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Whites may state a claim even where the discrimination against them is perpetrated by other whites, *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), as long as the discrimination is racial in character. This

Court should reject any effort to carve an exception in the coverage of the statute for Jews and other groups that are not racially distinct from whites but are the victims of racial violence and discrimination.

The Fourth Circuit's effort to define certain groups out of the protection of § 1982 inevitably would embroil the federal courts in the question of what a race is, and what groups in our society are racially distinct. This is an inappropriate task for the federal courts, and one which is made virtually impossible by the lack of a generally accepted scientific definition of race. Moreover, even if some scientific definition of race were available, it is the perceptions of racial distinctness held by the perpetrators of racial discrimination and violence that the statute is intended to address. The Fourth Circuit's conclusion is sadly ironic, because it absolves the respondents from liability precisely because their racist notions about Jews are so incorrect.

The Fourth Circuit's holding that Jews can never state a claim under § 1982 denies the protection of that statute to a group that is all too often the victim of the utterly erroneous belief that Jews are a separate race. Protection of Jews under § 1982 is an important weapon against the admitted racism against Jews of these respondents, and others like them, who perpetrate anti-Semitic discrimination and terror.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT § 1982 DID NOT APPLY TO A RACIALLY-MOTIVATED ATTACK ON PETITIONERS BECAUSE THE COURT ASSUMED THAT THE SCOPE OF STATUTORY COVERAGE WAS DETERMINED BY THE PETITIONERS' "RACE" RATHER THAN, AS REQUIRED BY THIS COURT, THE RACIAL MOTIVATION AND CHARACTER OF THE RESPONDENTS' CONDUCT.

A. Under This Court's Holdings Construing § 1 of the Civil Rights Act of 1866, Petitioners State a Claim Because the Discrimination Perpetrated by Respondents Was Racial in Character.

Nothing in this case could be plainer than that the petitioners were the victims of a racially-motivated attack. The whole point of respondents' conduct was to drive home to petitioners, in a particularly abusive and painful way, the continued menace of the completely erroneous Nazi and KKK ideology that Jews are a distinct and inferior race who do not deserve the same rights as other citizens.

The court of appeals nonetheless denied petitioners the benefit of a statute designed to redress injury caused by "*all racially-motivated deprivations* of the rights enumerated in the statute * * * ." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (emphasis added). The court of appeals sought to justify what, on its face, seems a patently unjust result with the seemingly benign and comforting conclusion that Jews are not, in fact, "a racially distinct group" or, at least, are not a group like "Mexican-Americans or others commonly considered to be non-whites" (Pet. App. 7a).

The surface benignity fades all too quickly. The Fourth Circuit's unsupported "finding" that Mexican-Americans are, or are commonly thought to be, "non-white," and its facile assumption that the vicious ideology that erupted against petitioners in this case is not "common," are two good examples of why courts should stay out of the business of determining the race, or the commonly assumed racial classification, of the plaintiff in a § 1982 case. Instead, courts should focus, as the decisions of this Court require, on the racial character and motivation of the defendants' conduct.

Section 1982 originated as part of § 1 of the Civil Rights Act of 1866, which was titled: "To protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication." The 1866 Act was prompted by Congressional concern about the "Black Codes," oppressive conditions of employment imposed on former slaves by their former masters, and other restrictions on the civil rights of blacks.[18] Yet the statute was cast in sweeping language which, by its terms, extended beyond coverage of blacks to protection of "all persons."[19] This Court

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[18] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull, author of the 1866 Act).

[19] Section 1 of the 1866 Act provided: "That all persons born in the United States and not subject to any foreign power * * * shall have the same right * * * to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens * * *." *See McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 289 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 422-37 (1968).

has recognized that the 1866 Act leaves no room for "ingenious analytical instruments" that would carve exceptions in its coverage, and has declared: "We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968), *quoting United States* v. *Price*, 383 U.S. 787, 801 (1966).[20]

This Court has never required plaintiffs in a case brought under the successors to the 1866 Act to prove that they are, in fact, of any particular racial lineage. To the contrary, in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), this Court rejected the argument that § 1982 does not protect a white plaintiff who suffered expulsion from a community park organization because of his attempt to transfer his membership share in the community park to a black. The Court looked not to Sullivan's race, but the reason for the discrimination against him.[21] The discrimination against Sullivan was racist in that he was expelled for advocating inclusion of a black in the organization. Thus, the Court held that Sullivan stated a claim under § 1982, even though the discrimination was not based on his own race, which was white.[22] The Court reached the same conclusion in *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973), in which it held that summary judgment was improperly granted in favor of the

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[20] *Accord City of Memphis* v. *Greene*, 451 U.S. 100, 120 (1981); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969).

[21] 396 U.S. at 237.

[22] *Id.*

defendant on a § 1982 claim by whites that their black guests were excluded from a recreation facility on account of race.[23]

The Court again rejected an artificial restriction that would limit coverage of th[e] 1866 Civil Rights Act to less than all racist deprivations of the enumerated rights when it held in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), that the statute prohibits racial discrimination against whites as well as nonwhites.[24] The Court grounded its holding in *McDonald* in the "language and history" of the statute.[25] The Court observed that the statute explicitly applies to " '*all* persons' (emphasis added), including white persons,"[26] and rejected the argument

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[23] *Accord Parr* v. *Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 890 (11th Cir. 1986) (white may state a claim under § 1981 for racial discrimination based on interracial marriage); *Pomeroy* v. *Merritt Plaza Nursing Home, Inc.*, 760 F.2d 654, 657 (5th Cir. 1985) ("addressing the question of jurisdiction under § 1982, both the Supreme Court and this Court have held that white persons who are injured because of antiblack prejudice may obtain relief in federal court").

[24] The issue in *McDonald* arose in the context of a claim under 42 U.S.C. § 1981, which provides that "[a]ll persons * * * shall have the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens * * *." Sections 1981 and 1982 both originated in § 1 of the Civil Rights Act of 1866. Thus, "[i]n light of the historical interrelationship between § 1981 and § 1982 [there is] no reason to construe these sections differently * * * " and cases under § 1981 are useful precedents in construing § 1982. *Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976), *quoting Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440 (1973).

[25] 427 U.S. at 286-87.

[26] *Id.* at 287.

that the phrase "as is enjoyed by white citizens" limits the coverage of the statute to non-whites. That language "was offered explicitly to technically 'perfect' the bill, and was accepted as such without objection or debate."[27] The Court explained that this phrase simply emphasizes " 'the racial character of the rights being protected.' "[28]

The legislative history cited by the Court in *McDonald* reflected that "the bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as non-whites."[29] Members of Congress fully recognized and intended that the coverage of the Act would extend to all persons, not just to selected "races" or categories of persons, the benefits of protection of their

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[27] *Id.* at 290-91. The legislative history suggests that the addition of this phrase was prompted by concerns that the Act might be construed to extend rights, such as the right to enter into binding contracts, to women or minors. Cong. Globe, 39th Cong., 1st Sess. 1293 (1866) (remarks of Rep. Shellabarger); *id.* at App. 157 (remarks of Rep. Wilson), *quoted in McDonald*, 427 U.S. at 293.

[28] *Id.*, *quoting Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966). *Accord City of Memphis* v. *Greene*, 451 U.S. 100, 131 (1981) (White, J., concurring) ("[p]urposeful racial discrimination is quite clearly the focus of the proscription, and this understanding of § 1982 is supported by the legislative history of the Civil Rights Act of 1866"); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975) ("§ 1981 affords a federal remedy against discrimination in private employment on the basis of race"); *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966) (what Congress intended to protect was not particular groups, but "a limited category of rights. specifically defined in terms of racial equality").

[29] *McDonald*, 427 U.S. at 289.

civil rights, including the right to hold property.[30] The legislative history further demonstrates that Congress did not conceive of the bill as a protection for any specified group of "races."[31] In opposing the bill, Sen-

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[30] Sen. Johnson described the scope of § 1 of the Act as follows:

> [N]o State shall discriminate at all between any inhabitants within her limits on account of any race to which they may belong, whether white or black * * *. [Cong. Globe, 39th Cong., 1st Sess. 505 (1866).]

Senator Trumbull stated that proposition emphatically: "Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights * * *." *Id.* at 599. House sponsors of the bill agreed: "[W]e must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." *Id.* at 1118 (remarks of Rep. Wilson). *Accord* Cong. Globe 41st Cong., 2d Sess. 3569 (1870) (remarks of Sen. Trumbull on the Enforcement Act of 1870, which reenacted the 1866 Act); *id.* at 3608 (remarks of Sen. Schurz).

[31] In fact, the legislative history indicates that members of Congress had very broad views of what groups constitute "races." Members identified as racial groups persons who generally are considered today to be national origin or religious groups. *E.g.*, "I controvert that a single citizen was ever made by one of the States out of the Chinese race, out of the Hindoos, or out of any other race of people but the Caucasian race of Europe." Cong. Globe, 39th Cong., 1st Sess. 523 (1866) (remarks of Sen. Davis); "All the nations of the earth and all the varieties of the races of the nations of the earth have gathered here. In the early settlements of the country, the Irish, the French, the Swede, the Turks, the Italian, the Moor, and so I might enumerate all the races and all the variety of races, came here * * *," *id.* at 570 (remarks of Sen. Morrill); "Who will say that Ohio can pass a law enacting that no man of the German race * * * shall ever own any property in Ohio * * *?" *id.* at 1294

ator Cowan challenged Senator Trumbull, the Chairman of the Senate Judiciary Committee and author of the bill, on the meaning of the word "race":

> I should like the honorable Senator from Illinois or any other senator to tell me what is meant by the word "race," and where it is settled that there are two races of men, and if it is settled that there are two or more, how many. Where is the line to be drawn? What constitute the distinctive characteristics and marks which limit and bound these races?[32]

Senator Trumbull, the author of the Act, did not define "race" in response, and no such definition appears in the legislative history. The sponsors of the Act were steadfast in their insistence that the statute's application was not limited to particular "races" but that it applied to "prohibit *all* racially motivated deprivations of the rights enumerated in the statute * * *." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 426 (emphasis in original).[33]

That Congress was addressing racial motivation—not racial groups—is further underscored by the concern expressed by members of Congress in the debates about the liberty and safety of Union men and

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(remarks of Rep. Shellabarger). Senator Cowan referred in the debate to "the Scandanavian races of the North." *Id.* at 499.

[32] *Id.*

[33] As Sen. Trumbull explained, "the very object and effect of the section is to prevent discrimination." Cong. Globe, 39th Cong., 1st Sess. 1758 (1866).

Republicans in the former Confederate States.[34] Congress would not have considered such persons to be protected by the 1866 Act if it intended a requirement that plaintiffs must be discriminated against because they belong to some particular race in order to state a claim. These Union loyalists were whites, discriminated against by whites, because of their support of the Union cause and of freedom and fair treatment for former slaves.[35] It was the fact that the discrimination against Union loyalists and Republicans was racial, because they advocated the rights of blacks, that gave rise to coverage. Their situations are clearly analogous to those of white advocates of civil rights for blacks who have suffered in more recent times, and who, as this Court held in *Sullivan*, are covered by the 1866 Act.

Indeed, the Reconstruction Congress anticipated that the 1866 Act was sufficiently broad and flexible

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[34] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1833-35 (1866) (remarks of Rep. Lawrence expressing concern about Quakers who were driven out of North Carolina because of their refusal to support war effort, and Union loyalists in Virginia, Texas, Alabama and South Carolina); *id.* at 1263, 1265 (remarks of Rep. Broomall concerning persecution of Union men in the South); *id.* at 1835 (remarks of Rep. Lawrence) (torture of blacks was admittedly intended to drive out certain whites as well as blacks); *accord* Cong. Globe, 41st Cong., 2d Sess. at 3512-13 (1870) (remarks of Sen. Morton on Enforcement Act of 1870); *id.* at 3668 (remarks of Sen. Spencer).

[35] This was verified in a report on the former rebel states which General Carl Schurz prepared at the request of President Johnson and which was before the Joint Committee on Reconstruction. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865). General Schurz linked the hostility toward Union loyalists with their support of the newly freed slaves. *See, e.g., id.* at 8-9, 26-27.

even to cover groups not then the subject of racial animus but who might become its victims in the future:

> If the people of a State should become hostile to a large class of naturalized citizens and should enact [laws restricting their civil rights], that would be prohibitory legislation.
>
> * * *
>
> This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it becomes a law, protect every citizen, including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law.[36]

The Fourth Circuit's requirement that plaintiffs must be members of a "racially distinct group" before the protection of the statute can be afforded is contrary to the statute's history and this Court's decisions which focus instead on the nature of the conduct directed at the plaintiffs.

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[36] Cong. Globe, 39th Cong., 1st Sess. 1833 (1866) (remarks of Rep. Lawrence). *Accord McDonald*, 427 U.S. at 295-96 ("[u]nlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves").

B. The Fourth Circuit's Construction of the Scope of § 1982's Coverage Is Unworkable and Defeats the Purpose of the Statute.

The court of appeals erroneously assumed that there exists some definition of "race" that would give content to its requirement that plaintiffs must be "racially distinct."[37] As Judge Wilkinson showed convincingly in dissent, however, "the scientific concept of 'race' is anything but definite" and thus is a "tool all too treacherous for a court seeking to de-

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[37] The court of appeals' requirement that a plaintiff must prove he or she is a member of a "racially distinct group" is puzzling, because it does not explain *from whom* the plaintiffs must be distinct. After *McDonald*, the answer cannot be that plaintiffs must be distinct from whites, because whites themselves are covered if they are the victims of racism. And *Sullivan* makes clear that the test cannot be that plaintiffs must be "racially distinct" from defendants, because both Sullivan and the defendants were white, yet Sullivan stated a claim because the retaliation against him was racist. In dissent, Judge Wilkinson rejected the implication in the majority opinion that the answer could be provided in this case by determining whether Jews are "commonly considered" to be "racially distinct":

> One anthropologist has observed that "Jews are nearly always referred to in popular parlance as a 'race.' This is done not only by the so-called 'man in the street' but also by many scientists, medical men, philosophers, politicians, historians, and the members of many other professions." A. Montagu, *Man's Most Dangerous Myth*, at 353 (footnote omitted). Thus, there exists a real question about the breadth of the views at work in this case. If the majority insists that misperceptions be broad based for § 1982 to apply, plaintiffs should at least be given the opportunity to show the scope of the belief that they are members of a distinct race. [Pet. App. 20a.]

termine the precise coverage of federal law" (Pet. App. 18a-19a).[38]

Moreover, the Fourth Circuit's approach defeats the

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[38] In holding that a plaintiff of Puerto Rican descent could state a claim of racial discrimination under § 1981, one district court explained that "a group of scientists after developing a list of 'racial types' emphasized that the list 'of 30 'races' might have been ten or 50; the line of discrimination in many cases is arbitrary * * *.' " *Ortiz* v. *Bank of America*, 547 F. Supp. 550, 565 (E.D. Cal. 1982) *quoting* C. Coon, S. Garn & J. Birdsell, *Races: A Study of the Problems of Race Formation in Man* 140 (1950). Another researcher has observed that "as few as three and as many as thirty-seven races have been described" in various anthropological studies. S. Molnar, *Human Variation: Races, Types, and Ethnic Groups* 16 (2d ed. 1983). In striking down the California miscegenation laws as unconstitutionally vague, the California Supreme Court observed that "[t]he number of races distinguished by systems of classification 'varies from three or four to thirty-four.' " *Perez* v. *Lippold*, 32 Cal. 2d 711, 198 P.2d 17, 27 (1948) (*en banc*) (Traynor, J., *quoting* F. Boas, 7 *Encyclopedia of Social Sciences* 25, 26 (1930)).

Because of the lack of precision in the definition of race, physical anthropologists and biologists now question seriously the usefulness and validity of the race concept. *See, e.g.*, Littlefield, Lieberman & Reynolds, *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 Current Anthropology 641 (1982) (by the end of the 1970's, challenge to the race concept in American physical anthropology "had become the modal position"); M. Banton & J. Harwood, *The Race Concept* (1975) ("[r]acial classification is a hangover from an outdated phase of science which now does insidious harm"); A. Montagu, *The Concept of Race*, in *The Concept of Race*, 24 (A. Montagu ed. 1964) ("[t]here is no such thing as the kind of 'race' in which the layman believes, namely, that there exists an indisoluble association between mental and physical characters which make individual members of certain 'races' either inferior or superior to the members of certain other 'races' ").

purpose of the Act because, as Judge Wilkinson recognized, where the purpose of federal law is to root out racism, the definition that must control is that adhered to by those who perpetrate racial violence, not a taxonomical classification of the victim:

> [I]t is not scientifically authenticated views but rather distorted social perceptions that lie at the root of racial violence. "The social definition and not the biological facts actually determines the status of an individual and his place in interracial relations * * * . [T]he scientific concept of race is *totally inapplicable at the very spots where we recognize 'race problems.'* " G. Myrdal, [*An American Dilemma*] at 115 [(1944)] (emphasis in original). [Pet. App. 19a.]

Other federal courts of appeals have recognized that racist conduct, even against groups not generally regarded as "racially distinct," gives rise to the protection of the Civil Rights Act of 1866. In the same week that the Fourth Circuit affirmed the dismissal of the Congregation's complaint, the Third Circuit held in *Al-Khazraji* v. *Saint Francis College*, 784 F.2d 505, 514 (3d Cir.), *cert. granted*, 107 S. Ct. 62 (1986), that "ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them." The defendant argued that an ethnic Arab is taxonomically a Caucasian and therefore "not a protected person under Section 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him." [39] The Third Circuit, however, concluded that "*McDonald* rejected the argument that Section

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[39] 784 F.2d at 514.

1981 is limited to the protection of non-whites against racial discrimination * * *. The protection against racial discrimination thus extends beyond those who are taxonomically members of the Negro race. Appellant is therefore not prevented from invoking Section 1981 merely because he is taxonomically classified as a member of the Caucasian race."[40] The court concluded from the legislative history of the 1866 Act that "Congress did not intend to limit Section 1981 solely to those who could demonstrate that they had been discriminated against because they belonged to a particular group identified and described by anthropologists. When Congress referred in the statute to 'race,' it plainly did not intend thereby to refer courts to any particular scientific conception of the term."[41] The court held that "Al-Khazraji should be allowed the opportunity to prove that the discrimination he alleges is racially motivated within the meaning of Section 1981,"[42] because:

> [W]here a plaintiff comes into federal court and claims that he has been discriminated against because of his race, we will not force him first to prove his pedigree. We are unwilling to assert that Arabs cannot be the victims of racial prejudice: "prejudice is as irrational as is the selection of groups against whom it is directed."[43]

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[40] *Id.* at 515.

[41] *Id.* at 516.

[42] *Id.* at 518.

[43] *Id.* at 517, *quoting Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979).

The Fifth Circuit recently relied on *Al-Khazraji* in holding that a white plaintiff who alleged that she was discharged from her employment due to racial discrimination because her Iranian husband was "considered by Defendants * * * as [a] member of a race other than White" is protected under § 1981. *Alizadeh* v. *Safeway Stores, Inc.*, No. 85-2816, slip op. 9979, 9983 (5th Cir. Sept. 26, 1986). The court considered "whether a woman who is married to an Arab and who has been discriminated against because her husband is considered by a prejudiced person to be nonwhite is entitled to the protection of § 1981."[44] Relying on *Al-Khazraji*,[45] the court recognized that

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[44] *Id.* at 9983. The court relied on *Faraca* v. *Clements*, 506 F.2d 956 (5th Cir.), *cert. denied*, 422 U.S. 1006 (1975), for the proposition that § 1981 "provides a cause of action to a white spouse who alleges that he was discriminated against in employment because of his marriage to a nonwhite." *Alizadeh*, No. 85-2816, slip op. at 9983.

[45] The court in *Alizadeh* quoted the *Al-Khazraji* court's statement that "Congress's purpose [in the 1866 Act] was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive." *Alizadeh*, slip op. at 9984-85, *quoting Al-Khazraji*, 784 F.2d at 517. Although the appearance, or physiognomy, of a plaintiff is a factor that might be offered in support of a claim that a defendant's conduct was racially motivated and thus prohibited by the 1866 Act, a "racially distinctive" appearance should not be a prerequisite of coverage. Such a requirement would run afoul of *McDonald* and thrust courts once again into the unseemly exercise of determining which persons look sufficiently "different" to be covered. Tests based on color or appearance conjure up the very evils that civil rights statutes attempt to prevent. In the *Nuremberg Diary*, G.M. Gilbert describes Julius

"[a]nthropologists classify Arabs as Caucasians" but rejected "a taxonomical definition of race" as not "in keeping with the rationale of *McDonald*."[46]

This Court should reverse the Fourth Circuit's decision to force the federal courts "into the business" of making racial determinations that encourage "precisely the kind of stereotyping which the civil rights statutes were designed to prevent."[47] Instead, the Court should hold, consistent with its decisions that

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Streicher's boasts that he could judge race by appearance:

> "They are crucifying me now," he said confidentially. "I can tell. Three of the judges are Jews."
>
> "How can you tell that?"
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> "I can recognize blood. Three of them get uncomfortable when I look at them. I can tell. I've been studying race for 20 years. The body structure shows the character. I'm an authority on that subject. Himmler thought he was, but he didn't know anything about it. He had Negro blood himself."
>
> "Really?"
>
> "Oh yes," he grinned triumphantly, "I could tell it by his head shape and hair. I can recognize blood."

G.M. Gilbert, *Nuremberg Diary* 43 (1947).

Any test based on "ethnic" groups is doomed to the same confusion as a test based on a taxonomic definition of "race" because the two terms are so often used interchangably. *See* Black's Law Dictionary 1132 (5th ed. 1979) (defining "race" as: "An ethnical stock * * *").

[46] *Alizadeh*, slip op. at 9984. *Accord Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979).

[47] *Khawaja* v. *Wyatt*, 494 F. Supp. 302, 305 n.1 (W.D.N.Y. 1980). *See also* Note, *Who Is a Negro?*, 11 U. Fla. L. Rev. 235 (1958); Note, *Racial Designation in Louisiana: One Drop of Black Blood Makes a Negro!*, 3 Hastings Const. L.Q. 199 (1976).

"[u]nder [the] language [of § 1982], a person's race is irrelevant to the existence of the declared rights,"[48] petitioners are not barred by a test of "racial distinctiveness" from the protection of § 1982 for the racist attack on their place of worship.

C. The Holding of the Court of Appeals Leaves Victims of Racist Attacks and Discrimination Unprotected by the Civil Rights Acts.

Contrary to the court of appeals' assumption that the racist acts and attitudes toward Jews displayed in the desecration of petitioners' synagogue are unusual, violence and discrimination based on the erroneous premise that Jews are a separate race is not just an historical artifact but a contemporary reality. Failure to reverse the court of appeals will signal federal tolerance for a menace that is all too prevalent.

The National Socialist Party of America holds among its "fundamental principles" belief in "The Jew as the Ultimate Enemy." The official party newspaper expresses this principle in the following terms:

> The single serious enemy facing the White man is the Jew. The Jews are not a religion, they are an Asiatic *race*, locked in mortal conflict with Aryan man which has lasted for millennia, and which will continue until one of the two combat peoples is extinct.[49]

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[48] *City of Memphis* v. *Greene*, 451 U.S. 100, 130-31 (1981) (White, J., concurring). *Accord Burnett* v. *Grattan*, 468 U.S. 42, 50 (1984) ("[t]he statutes [the Civil Rights Acts] are characterized by broadly inclusive language. They do not limit who may bring suit").

[49] H. Covington, *10 Fundamentals of National Socialism*, The New Order 3 (Mar. 1979) (emphasis in original).

In perpetrating hate violence, neo-Nazis have identified Jews as targets because Jews are perceived as non-white. For example:

> [I]n Houston, Texas, in December, 1977, the local unit of the National Socialist White Workers Party, through its recorded telephone message, offered an award of $5,000 "for every non-white killed during an attack on a white person." Defending the award, Nazi spokesman Dennis Milem stated it was time "for an all-out war for whites against non-whites, and that includes Jews."[50]

Neo-Nazi hate literature in the United States is rife with racist references to Jews. For example, *Aryan Nations*, the official publication of a neo-Nazi group of the same name, has exhorted its readers: "Aryans Awake! Jews are the Race of Satan!"[51] The magazine explains the program of the Aryan Nations movement in the following manner:

> There is no hope for the White race, if it does not immediately come to the grim realization that the Jewish powers who presently rule over the Western nations desire and work toward the absolute destruction of White men everywhere. The Jews and their surrogates * * * try to force mongrelization of the White race, especially in Britain and America: from racial bastardization there can

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[50] Anti-Defamation League of B'nai B'rith, 24 Facts 7 (March 1978).

[51] *Aryan Nations*, No. 30, at 8 (R. Butler ed. 1983).

> be no hope of return to genetic purity and vitality.[52]

These attitudes, and the violence they foster, demonstrate why Jews need the protection of the federal Civil Rights Acts. That Jews are, in fact, not a racial group has never protected them from being a target of racially-motivated violence. The Anti-Defamation League of B'nai B'rith reported 638 incidents of anti-Semitic vandalism against Jewish institutions and private Jewish homes and businesses in 34 states and the District of Columbia in 1985; Maryland ranks fifth in such incidents. *See* Anti-Defamation League of B'nai B'rith, *1985 Audit of Anti-Semitic Incidents* 1, 5 (1986). Other indications of the seriousness of the problem include the violent actions of a neo-Nazi group called "The Order" and the activities of other organized anti-Jewish hate groups including neo-Nazi groups, the KKK, and the Posse Comitatus.[53]

Montgomery County, Maryland, the location of Shaare Tefila, has all too frequently seen such acts of anti-Semitic hate violence. The Montgomery County Maryland Human Relations Commission reports that 195 hate violence incidents (including harassment, vandalism, assault, arson and cross-burning) occurred in the County in 1985, compared with 151 such incidents in 1984.[54] Jews were the target in 68 incidents

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[52] *Aryan Nations*, No. 32, at 7 (R. Butler ed. 1983).

[53] *See, e.g., Neo-Nazis Inspire White Supremacists*, Washington Post, Dec. 26, 1984, at A3, col. 1.

[54] Montgomery County [MD] Human Relations Commission, *Montgomery County Government Hate/Violence Incidents Fact Sheet* (Oct. 20, 1986).

in 1985 and 67 in 1984.[55] In addition, 118 incidents have occurred in 1986 (through October 17, 1986), of which 53 were directed at Jews.[56] The graphic display of Nazi and other racist symbols is not unique to the Shaare Tefila desecration.[57]

It is not enough to say, as Judge Murnaghan did in concurrence, that the state courts can handle such affronts to the civil rights of Jewish people (Pet. App. 10a). The 1866 Act was "intended at the very least to supplement state laws. *See Jones*, 392 U.S. at 426-36" (Pet. App. 22a) (Wilkinson, J., dissenting).[58] The Civil Rights Act of 1866 was intended to provide a remedy for precisely the kind of terror and harass-

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[55] *Id.*

[56] *Id.*

[57] *See Local Anti-Semitic Acts More Violent*, Washington Post, Sept. 21, 1985, at B6, col. 1 ("Anti-Semitic incidents in affluent Montgomery County are getting more violent and account for about 75 percent of all reported racial violence in the county, officials said this week"); *Anti-Semitic Incidents Called More Violent*, Montgomery Journal, Sept. 19, 1985, at A5, col. 1. The incidents described included the desecration of a Jewish Community Center building near an orthodox synagogue, with five-foot high swastikas, and an elementary school, with swastikas and the slogans "Hitler youth" and "Jews must die." A synagogue in neighboring Prince George's County also was recently desecrated. Anti-Defamation League of B'nai B'rith, *1985 Audit of Anti-Semitic Incidents* 4 (1986); *Laurel Synagogue is Defaced*, Washington Post, Sept. 16, 1985, at D5, col. 4.

[58] *See* Cong. Globe, 39th Cong., 1st Sess. 1415 (1866) (remarks of Sen. Davis, an opponent of the Act, complaining that § 1 would "harmonize" the laws of the states); *id.* at 1118 (remarks of Rep. Wilson, a proponent of the Act, that "the practice of the states leaves us no avenue of escape, and we must do our duty by supplying the protection which the states deny").

ment inflicted in this case; the activities of the Ku Klux Klan, whose symbols the respondents appropriated here, were a particular focus of Congressional concern.[59]

Moreover, Judge Murnaghan is simply not correct in assuming that remedies for the conduct at issue here are available under state law. State criminal statutes generally—and Maryland criminal statutes specifically—provide no compensation for the victims and depend to a large degree upon prosecutorial discretion.[60] Most important, state tort and common law

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[59] *See* Cong. Globe, 41st Cong., 2d Sess. 3668 (1870) (remarks of Sen. Spencer, condemning the acts of the Ku Klux Klan); *id.* at 3808 (remarks of Sen. Stewart, also regarding the Ku Klux Klan); *id.* at 3611 (remarks of Sen. Pool, condemning "organizations which committed outrages, which went through communities for the purposes, of intimidating and coercing classes of citizens in the exercise of their rights").

[60] The inadequacy of state criminal remedies is illustrated by the record of criminal prosecutions of the respondents here. Six respondents were indicted for their acts on the night of November 1, 1982. Only two of eight counts in the indictments related directly to the synagogue desecration: one count for destruction of property and one count for conspiracy to commit malicious destruction of property. The prosecution entered a *nolle prosequi* against one of the respondents. *See* Circuit Court for Montgomery County, Maryland, Crim. No. 29908 (Thomas Lloyd Heine). Three pleaded guilty to single counts unrelated to the synagogue desecration and received suspended sentences. *See* Circuit Court for Montgomery County, Maryland, Crim. Nos. 29914 (John William Cobb), 29907 (Thomas Joseph Hunt, Jr.), 29918 (Dominic Maurice Queen). One respondent pleaded guilty to two counts, including the count for conspiracy to commit malicious destruction of property, and received a sentence of three years with all but 120 days suspended. *See* Circuit Court for Montgomery County, Maryland, Crim. No. 29909 (William

remedies largely ignore the racist character of the acts. A prosecution for destruction of property or a civil suit for trespass simply does not convey to the perpetrators of these acts that it is the racist character of the acts—and the resulting injury to individual dignity—that society deplores, not just damage to property.

It is a reproach to our legal system that a federal court of appeals should regard the racially-motivated desecration of Shaare Tefila's synagogue as no more than a garden variety trespass and that the penalty for writing "DEATH TO THE JUDE" and "IN, TAKE A SHOWER JEW" on the walls of a synagogue is no different from the penalty for writing ordinary graffiti on the side of an office building. For this Court to reiterate that holding would only give aid and comfort to those who act on racial biases that tear at the fabric of our society.

Randall Harris). A single respondent was tried and convicted on the two counts relating to the synagogue desecration. *See* Circuit Court for Montgomery County, Maryland, Crim. No. 29903 (Michael David Remer). He received three-year concurrent sentences on those counts. One of the conditions of his probation was that he provide 300 hours of service to Jewish charity. *Id.*, Order for Probation, Sept. 2, 1983. That requirement was changed to 300 hours of service to the community generally when he requested that he not be required to work for Jews. *See id.*, Letter to Hon. David L. Cahoon from Walter B. Sizemore, March 14, 1986; Order, May 15, 1986. This unrepentant attitude, as well as the continued belief by respondents that Jews are racially distinct which is illustrated in the deposition testimony cited at pp. 8-9, *supra*, shows why a federal civil rights claim is so important to victims. It confronts the perpetrators of these acts on the issue of racism. It is racism, not damage to property, which is the truly offensive and destructive element of the conduct.

CONCLUSION

For all of the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed, and the Congregation should be given the opportunity to prove its claims under the federal Civil Rights Acts, 42 U.S.C. §§ 1982 and 1985(3).

Respectfully submitted,

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